Federal Court  Cour fédérale

Date: 20210520

Docket: T-376-21

Citation: 2021 FC 471

Ottawa, Ontario, May 20, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MCCLINTOCK'S SKI SCHOOL & PRO SHOP INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review concerns decisions of a Navigation Protection Program Officer [Officer] of Transport Canada made pursuant to the *Canadian Navigable Waters Act*, RSC 1985, c N-22 [*CNWA*]. McClintock's Ski School & Pro Shop Inc. [Ski School or Applicant] challenges the Officer's authority to require the submission of applications for the approval of three waterskiing courses, as well as the Officer's denials of two of its three

applications to approve the waterskiing courses. The application is brought pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Background

[2] The Applicant claims that the first waterskiing course on Puslinch Lake, a slalom course, was placed by riparian owners on the north shore of the lake around 1950 [North Course]. A second slalom course was placed by riparian owners in the southern part of the lake around 1952 [South Course]. The Puslinch Lake Water Ski Club [PLWSC] was established in 1962 and in that same year it set up a third slalom course in the western part of the lake [West Course].

[3] McClintock's Ski School & Pro Shop Inc. has been operating since 1978 as the successor to the Cam-Ann Water Ski School (1958-1978) and the PLWSC (1950-1958). The Ski School is a family-run business, owned and operated by Jaime and Jason McClintock. The Ski School utilizes the three waterskiing courses in its business operations; the North Course also includes a parallel jump course.

[4] The Applicant describes the North Course as comprising a series of 26 buoys each attached to two cement blocks on the lakebed, with a centre securing cable system under the silt for both the slalom and jump courses. There are also timing buoys on either end of the slalom course and the jump course comprises a further eight buoys and the ramp. The South Course is similarly configured, but has no jump or cable system. The Applicant submits that the cement blocks of the South Course have not been altered since 1962 and that the cement blocks and cable system of the North Course have not been altered since 1972.

[5] According to the Applicant, the Ski School's season runs from May to October, operating every day, between 9 and 5 on the weekends and 9 and 6 through the week. It has held numerous national and international waterskiing events and has trained numerous World Champions, Pan Am Champions, and Olympians.

[6] In late July and early August 2020, Transport Canada received three complaints regarding the Applicant's waterski courses and opened a file. On August 14, 2020, the Officer emailed the Ski School advising that the Navigation Protection Program [NPP] is responsible for the administration of the *CNWA* which Act prohibits the construction or placement of any "works" in, on, over, under, through, or across a navigable waterway without complying with the requirements of the Act. The Officer stated that it had come to the NPP's attention that multiple slalom courses on Puslinch Lake may have been placed since the coming into force of the *CNWA* on August 28, 2019, that the courses are considered "works" as defined by the *CNWA* and, as such, required review and approval for any construction, placement, alteration, building, removal or decommissioning. The Officer requested the Applicant to submit an application so the work could be brought into compliance. The Officer did not advise the Applicant of the complaints.

[7] The Applicant submitted approval applications for each of the three waterskiing courses on September 6, 2020. Various communications were exchanged between the Officer and the Applicant between September 6 and October 29, 2020, during which the Applicant provided further requested information.

[8] As part of the approval process, and as required by the *CNWA*, on October 29, 2020, the Ski School published a one-day notice for each of the three approval applications [Notice]. This notified the public of the applications for approval of the described works, the waterskiing courses, and that comments in writing regarding the effect of the works on marine navigation could be submitted for consideration if received not later than 30 days after publication of the notice.

[9] Many comments were received, these were mostly anonymous and were opposed to the approvals.

[10] By email dated December 2, 2020, the Officer informed the Applicant that a number of navigation-related comments had been received, mostly concerning the North and South Courses. The Officer advised that there was the potential that those courses in their current locations may not be approved.

[11] In a telephone call on January 27, 2021 and by email dated January 28, 2021, the Officer advised the Applicant that Transport Canada would be granting the approval for the West Course, but would be denying the applications for the North and South Courses. In the Officer's email she also set out the rationale for the denials. By reply email the following day, the Applicant stated that it disagreed with Transport Canada's preliminary position. The Applicant stated that it felt that it was entitled to a reasonable opportunity to provide information and to respond to the issues raised before such an important decision, impacting the lives and livelihood of a large number of people, was made.

[12] By email dated January 29, 2021, the Officer advised the Applicant that the denials would be likely be issued early the following week and that the Applicant's "opportunity to respond to the issues that we have raised will be in the form of a new application for approval for a new location on the lake".

[13] By letters of February 1, 2021, the Officer formally denied the North and South Course applications.

Decisions under review

[14] In the February 1, 2021 decision letters the Officer states that the requests for approval were assessed against the factors identified in s 7(7) of the *CNWA* and it was decided that approval could not be issued because the level of interference to navigation was determined to be unacceptable. That determination was based on the characteristics of Puslinch Lake, the safety of navigation on the lake, the impact of the work on navigation, and public comments that were received.

[15] As to the North Course, the relevant decision letter states:

> This course is located in the main navigable passageway in the north part of the lake. Due to the high volume of traffic, activities and works (vessels, swimmers, docks, slalom course and ski jump, float planes) located in the north part of the lake, this area is extremely congested and presents a public safety concern for users of the waterway. The proximity of this slalom course to the shore does not provide sufficient horizontal clearance for safe navigation or other water activities in this area of the lake. The high frequency of usage of this course does not allow for vessels, both mechanically and/or human powered, to safely navigate to or from the shore or to use this part of the waterway for any length of time.

> This course also includes a jump, which impacts vessel traffic because there is a higher likelihood of a skier falling, which could result in the vessel having to turn around, and navigate outside of the parameters of the course buoys, potentially even closer to shore. This slalom course has cumulative impacts to the riparian owners, adjacent works and other vessels that cannot be mitigated.

[16] The South Course decision letter states:

> This course is located in the only navigable passage in the south part of the lake. It is currently blocking safe passage. The restriction of the horizontal clearance is too great to provide safe passage for other vessels. This slalom course has cumulative impacts to the riparian owners, adjacent works and other vessels that cannot be mitigated.

[17] Both letters state that the work cannot be approved in its current location and must be removed by May 31, 2021. Should the Applicant wish to propose a new location, the NPP was willing to review a new application.

Legislation

[18] The most relevant provisions of the *CNWA* are set out in Annex A of these reasons.

Issues

[19] In my view, the issues can be framed as follows:

Preliminary issues:

1. Is the Respondent required to adduce affidavit evidence?
2. Should the Applicant be granted leave to file additional affidavits (Rule 312 motion)?

Substantive issues:

1. What are the applicable standards of review?
2. Was the NPP authorized to require the approval applications?
3. Was the Applicant denied procedural fairness in the approval process?
4. Were the denials of the approval applications reasonable?

Preliminary Issue 1: Is the Respondent required to adduce CTR evidence by affidavit?

[20] The Applicant submits that the Officer cannot rely on her notes or the Certified Tribunal Record [CTR] for the truth of their content and must adopt any evidence on which the Officer intends to rely by affidavit. For this argument, the Applicant relies on *Tajgardoon v Canada* (2000), [2001] 1 FC 591 (FCTD); *Chou v Canada* (2000), 190 FTR 78 (FCTD), aff'd 2001 FCA 299; and *Wang v Canada*, [1991] 2 FC 165 (FCTD).

[21] The Applicant also suggests that the CTR is deficient as it was redacted without justification and appears to be missing materials, including internal NPP communications. The Applicant asserts that the CTR was "curated" by the Officer who "scrubbed it for usefulness rather than relevance", contrary to the presumptions that the entire record must be produced (citing *Nguesso v Canada*, 2015 FC 102 at paras 87–89, 93). According to the Applicant, the content of the CTR is "contested hearsay" which is neither necessary nor reliable and it would be manifestly unjust to permit the Officer to tender her curated file in place of affidavit evidence while shielding herself from cross-examination.

[22] Conversely, the Respondent submits that a respondent is not obliged to submit affidavit evidence and that Rule 310(2)(c.1) of the *Federal Courts Rules*, SOR/98-106, allows a respondent to include in its record any material that has been certified and transmitted under Rule 318, without requiring an affidavit. The Respondent relies on *Hinton v Canada (Minister of Citizenship & Immigration)*, 2008 FC 7, in support of this position. The Respondent also states that the Applicant has provided no evidence to support its accusation that the CTR has been curated. Moreover, as to the Applicant's suggestion that the content of the CTR cannot be relied upon, the Respondent states that the question before this Court is whether the Officer's decisions were procedurally fair and were reasonable based on the law and the record before her.

Analysis

[23] In my view, the Applicant's submissions asserting that the Officer is required to submit the content of the record that was before her when she made her decisions by way of affidavit is without merit.

[24] Rule 310 sets out the required content of a respondent's record. This includes any supporting affidavits and documentary exhibits (Rule 310(2)(b)). And, as noted by the Respondent, Rule 310(2)(c.1) states that any material that has been certified by a tribunal and transmitted under Rule 318 that is to be used by the respondent at the hearing and that is not contained in the applicant's record is to be included in the respondent's record.

[25] Pursuant to Rule 317(1), a party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the

possession of the party by serving on the tribunal and filing a written request, identifying the material requested. In this case, the Applicant did not request the CTR. Rather, on March 10, 2021, the Respondent made the request. The Officer, pursuant to Rules 317 and 318, certified that the record enclosed (Appendices A and B) contained true copies of all materials in the possession of the Respondent, relevant to the February 1, 2021 decisions to issue denials in relation to the applications for approval of the North and South Courses. On April 6, 2021, the Respondent provided Appendices A and B of the CTR to the Court and the Applicant. On April 8, 2021, counsel for the Respondent sent an email to counsel for the Applicant advising that in reviewing the CTR it had come to their attention that correspondence that had been received by the Officer but was not considered in the Officer's decision-making had not been included in the CTR as it had been determined to be irrelevant to the matter to be decided. However, counsel had asked that the correspondence be compiled and provided to the Applicant. On April 12, 2021, the Officer provided Appendix C of the CTR , described as "public comments dated November 8, 2020 to January 14, 2021 received and reviewed by Transport Canada but erroneously omitted from the CTR dated April 1, 2021".

[26] Thus, what was required was that the Officer provide a certified true copy of all relevant materials pertaining to the applications that were in her possession when she made her decisions. Relevance pertains to the grounds of review in the notice of application (*Canada (Human Rights Commission) v Pathak*, [1995] 2 FC 455 (FCA) leave to appeal to SCC refused (1995), 198 NR 237n (SCC); *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 109). She was not required to provide this material by way of an affidavit. Further, there is no obligation on the Respondent to file affidavit evidence. As held in *Tajgardoon*, a respondent

need only file those affidavits on which they propose to rely. If there are none, none need be filed. Further, the record produced by way of the CTR is not evidence as to the truth of its content, but it is admissible as reasons for the decision (*Tajgardoon* paras 10–12; *Chou* at paras 13, 16). Nor is this a situation where the respondent seeks to rely on an officer's notes or a memorandum prepared by an officer as evidence of the facts to which they refer, i.e., as proof of the truth of their content, in which case they would have to be adopted as the evidence of the officer by way of affidavit (see *Jahazi v Canada (Citizenship and Immigration),* 2010 FC 242).

[27] I would also note that the three cases relied upon by the Applicant are all immigration decisions. Case law has made it clear that officer's notes entered into the Global Case Management System, or GCMS (the successor to the Computer Assisted Immigration Processing System, or CAIPS, referenced in *Tajgardoon*), form part of the reasons for an immigration decision (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 44).

[28] In short, I do not agree with the Applicant that the Officer should be required to attest to the truth of the CTR's content by affidavit. Nor could she do so with respect to much of that material, such as the complaints received in response to the Notice. The CTR represents the relevant materials that were before the decision maker at the time the decisions were made and her reasons for her decisions. While the Applicant is free to point to aspects of the record that, in its view, do not support the reasonableness of her decisions or support the Applicant's claim of a lack of procedural fairness, the Applicant cannot compel the Officer or the Respondent to file affidavit evidence. Rule 310 permits the Respondent to include materials from the CTR in its

application record without the need to attach the materials to an affidavit (*Cold Lake First Nations v Noel*, 2018 FCA 72 at para 26).

[29] As to the Applicant's assertion that the CTR is deficient as it was redacted without justification, this appears to refer to the fact that the Officer redacted the names of those who made the triggering complaints and who responded to the Notice, many of whom requested anonymity alleging a fear of retribution. The Applicant does not explain how knowing the identities of those individuals would further its case but suggests that the complaints could all have originated from one person. Given that the actual complaints and concerns are found in the CTR, I fail to see how the Applicant is prejudiced by these redactions, further the Applicant's assertion as to a common author for the complaints is speculative. In any event, the Applicant did not bring a motion seeking to compel the Respondent to produce the redacted identities or other materials, such as internal NPP communications, that it alleges may be missing from the CTR.

Preliminary Issue 2: Should the Applicant be granted leave to file additional affidavits?

[30] On April 21, 2021, the Applicant filed a motion seeking leave to file two additional affidavits: a reply affidavit of Jaime-Lyn McClintock, affirmed on April 14, 2021, [McClintock Affidavit #3] and an affidavit of Rosalie Fischetti, legal assistant, Fernandes Hearn LLP, counsel for the Applicant, affirmed on April 21, 2021 [Fischetti Affidavit].

[31] McClintock Affidavit #3 attaches no exhibits. It states that its purpose is to reply to the materials found in the CTR and states that the existence of the complaints that triggered the NPP request that the Ski School submit applications for the approval of the three waterskiing courses

were not disclosed to the Ski School. It responds to certain information contained in the public comments received by the NPP in response to the Notice that Ms. McClintock deposes is false. It also takes issue with assumptions utilized by the Officer in calculating the required buffer zone for the North Course and the failure of the Officer to offer the Applicant an opportunity to respond to the Officer's concerns before denying the applications.

[32] The Fischetti Affidavit describes the background to the request for and production of the CTR, communications between counsel as to the timetable for the filing of the CTR, the filing of affidavits, the conducting of cross-examinations, the filing of memoranda of fact and law leading up to the hearing, the filing of Appendix C of the CTR, the Applicant's intention to serve and file a reply affidavit, the Respondent's objection to same, and the Applicant's advice that it would seek leave of the Court to file the reply affidavit. The communications are attached as exhibits to the Fischetti Affidavit.

[33] The Applicant submits that additional affidavits should be permitted under Rule 312 when the evidence is admissible and relevant and further, where it is in the interests of justice to do so. In that regard, the factors to be considered by the Court when exercising its discretion are set out in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 [*Forest Ethics*]. The Applicant submits that allowing the affidavits to be filed is in the interest of justice as it will not prejudice the Respondent, it will assist the Court in determining the issues of procedural fairness and reasonableness of the denials, and the evidence was not available before the Applicant's Rule 306 affidavits were due.

[34] The Applicant submits that McClintock Affidavit #3 supports the Applicant's allegation that the decision maker's duty of procedural fairness was not satisfied as it shows that the substance of the complaints against the course approval applications was not communicated to the Applicant and that, had it been given the opportunity, the Applicant could have responded. The affidavit also shows that the Officer's assumptions about the situation were wrong.

[35] The Fischetti Affidavit presents evidence of an admission by counsel for the Respondent that the Officer did not consider the materials that were submitted to her contained in Appendix C of the CTR, including comments in support of the applications refuting the navigability concerns. The Applicant submits that the fact that they were not considered goes to whether the procedure was fair and the decisions were reasonable.

[36] The Applicant submits that the evidence contained in the additional affidavits was not available to it before it was required to file its affidavits under Rule 306, within 30 days after February 26, 2021. McClintock Affidavit #3 responds to information in the CTR, which was provided to the Applicant on April 2, 2021, and the Fischetti Affidavit presents evidence that did not exist at the time the Applicant's original affidavits were filed. Nor will the admission of the affidavits cause substantial or serious prejudice to the Respondent.

[37] The Respondent has not filed a responding motion record and does not oppose the Applicant's motion seeking leave to file the reply affidavits.

Analysis

[38] Rule 312 permits a party, with leave of the Court, to file additional affidavits. The Federal Court of Appeal in *Forest Ethics* (at paras 4–6; also see *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 6) set out the requirements that must be met to obtain leave under Rule 312. First, an applicant must satisfy two preliminary requirements:

> (1) The evidence must be admissible on the application for judicial review. Generally the record before the reviewing court consists of the material that was before the decision-maker, although there are exceptions to this; and
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court.

[39] If these two preliminary requirements are met, the applicant must then convince the Court that it should exercise its discretion in favour of granting leave. Three questions have been identified to guide the Court in determining whether the granting of leave under Rule 312 is in the interests of justice:

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

(see also *Tsleil-Waututh Nation* paras 10–16).

[40] As a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision maker. Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at para 35).

[41] The first exception is an affidavit that provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker. The second exception is evidence that brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker so that the Court can fulfill its role of reviewing for procedural unfairness. The third exception is evidence that highlights the complete absence of evidence before the administrative decision maker when it made a particular finding.

[42] I am satisfied that in these circumstances the McClintock Affidavit #3 and the Fischetti Affidavit are relevant to the issues of procedural fairness and reasonableness raised by the Applicant in this application for judicial review. Further, that the evidence could not have been submitted before the Applicant's Rule 306 affidavits were due. McClintock Affidavit #3 responds to materials in the CTR that were not provided to the Applicant until after its initial affidavits were filed. The Fischetti Affidavit primarily provides background information as to

timing, in particular when the CTR and Appendix C of the CTR were provided to the Applicant, as well as evidence explaining why Appendix C was provided, which evidence was not available when the initial affidavits were filed. The Respondent does not contend that the filing of the affidavits will cause it to be prejudiced, and the evidence contained in the affidavits will assist the Court in determining the issues of procedural fairness and reasonableness of the denials. Accordingly, granting leave to file the affidavits is in the interests of justice.

Standard of Review

Applicant's position

[43] The Applicant submits that the presumptive standard of review is reasonableness, referencing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[44] With respect to procedural fairness, the Applicant submits that procedural fairness concerns "now overlap quite considerably with the reasonableness review required by Vavilov insofar as the process is concerned".

[45] The Applicant submits that the question of whether or not the Officer had the statutory authority to require the Applicant to make s 10 approval applications should be reviewed on a standard of correctness. This is because s 10 of the *CNWA* is the process for the approval of new or future works. In the absence of clear legislative intent, it cannot be applied retrospectively to a project that dates from the 1950s. The presumption that the reasonableness standard applies is rebutted where the rule of law requires it, as is the case with this issue.

Respondent's position

[46] Referencing *Vavilov*, the Respondent submits that the reasonableness standard presumptively applies to all administrative decisions unless either legislative intent or the rule of law requires otherwise. Here the presumption is not rebutted. The Respondent seems to argue that a reasonableness standard applies to issues of procedural fairness, stating that "[o]n issues of procedural fairness, the question of reasonableness is whether the procedure was fair having regard to all of the circumstances, and by fairness, the issue is whether the applicant knew the case to meet and had an opportunity to respond".

Analysis

[47] The Supreme Court of Canada in *Vavilov* held that the standard of reasonableness presumptively applies whenever a court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption may be rebutted in two circumstances. The first is where the legislature has prescribed the standard of review or where it has provided a statutory appeal mechanism thereby signalling the legislature's intent that appellate standards should apply (*Vavilov* at paras 17, 33). The second circumstance is where the rule of law requires the application of the correctness standard. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53). The substantive issues raised by the Applicant do not fall within any of these categories of questions.

[48] When applying the reasonableness standard, a reviewing court "asks whether the decision bears the hallmarks of reasonableness–justification, transparency and intelligibility–and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

[49] I also note that, within its discussion of how a reasonableness review is to be conducted by a reviewing court (*Vavilov* at paras 73–142), the Supreme Court addressed the principles of statutory interpretation as an element of a reasonableness analysis and held that matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard (*Vavilov* at para 115). The Applicant's submission concerning the retrospective application of the *CWNA* concerns principles of statutory interpretation, which are also to be assessed on the reasonableness standard. This does not raise a rule of law issue, as identified in *Vavilov*, attracting the correctness standard. And, in any event, for the reasons set out below, the factual context of this matter does not support that the CNWA was applied retrospectively.

[50] Questions of procedural fairness are reviewable on the standard of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[51] And, as stated by the Federal Court of Appeal in *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 39, referencing its decision in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, judicial review for procedural fairness is "best reflected in the correctness standard". No deference is afforded to the underlying decision maker on questions of procedural fairness (*Del Vecchio v Canada (Attorney General)*, 2018 FCA 168 at para 4).

Issue 1: Was the NPP authorized to require the approval applications?

Applicant's position

[52] The Applicant submits that the Officer had no statutory authority to direct the Applicant to make the *CNWA* s 10 applications. The Applicant's waterski courses were constructed before the *CNWA* came into force and have not been modified since. The *CNWA* has no retroactive or retrospective effect and the application for approval process provided for by s 10(1) is for future work; it cannot be used to regularise or "true up" a project from the 1950s. While the NPP could have conducted an investigation under s 13 of the *CNWA* when it received the triggering complaints, it instead demanded compliance with s 10, which is the process for approval of new works or for the altering or decommissioning of works, not existing ones.

Respondent's position

[53] The Respondent submits that the Officer's request that the Applicant apply for approval of the works at issue was to allow the Officer to consider whether approvals were justified under s 7(13) of *CNWA*, not s 10 as the Applicant asserts.

[54] The Respondent contends that the Applicant was required to comply with s 10 before "placing" its works in the lake. The fact that the Applicant had not previously sought or been given approval for the waterskiing courses does not detract from or lessen its obligation to comply with the *CNWA*. And, because the works were placed without complying with s 10, the Officer considered whether, under s 7(13), it would be justified in the circumstances to approve their placement after the fact [WR paras 26-28].

Analysis

[55] In her initial email to the Applicant, the Officer stated that the NPP is responsible for the administration of the *CNWA*, which prohibits the construction or placement of any "works" in, on, over, under, through, or across a navigable waterway without complying with the requirements of the *CNWA*. She stated that it had come to the NPP's attention that multiple slalom courses may have been "placed" since the coming into force of the *CNWA* in August 28, 2019 and that the courses are considered works as defined in the *CNWA* and require review and approval for any construction, placement, alteration, rebuilding, removal, or decommissioning. She requested that the Applicant submit an application for approval so that the work could be brought into compliance.

[56] The definition of "work" in s 2 of the *CNWA* includes "any structure, device or other thing, whether temporary or permanent, that is made by humans". Further, pursuant to s 3, it is prohibited to construct, place, alter, rebuild, remove, or decommission a work in, on, over, under, through, or across any navigable water, except in accordance with the Act.

[57] It is of note that in its application for the North Course the Applicant describes the course as follows:

> Course consists of a total of 26 buoys + additional 8 buoys for jump course. North Course spans 400m in length and 40 m in width and runs from West to East parallel to the shoreline. The edge of the course sits 50m from the shoreline. Each buoy is held in place while attached to a sub float with bungee, which is then secured to a cinder bock with marine rope.

[58] Similar descriptions are found in the other applications.

[59] After the applications were submitted, the Officer asked the Applicant for further information about the buoys. The Applicant advised that the North and West Courses have a cable running down the center line of boat guides (middle buoys), the cables sit in the silt. The South Course comprises individually anchored buoys. All course turn buoys are individually anchored. A diagram of the buoy system was circulated indicating that each buoy is anchored by two cement blocks about 2m from the surface. The anchor line is made up of 1m of rope attached to the cement blocks, a sub buoy, a 1m elastic bungee cord, and the surface buoy.

[60] When the Applicant was instructed to make applications for its waterski courses, a distinction was not made between the permanent components of the courses on the lake bed and the above-bed components. However, the Applicant does not dispute that the buoys are removed at the end of each waterskiing season and reset at the beginning of the next season. It is also clear from the record that the Officer was aware that the buoys are "placed" every spring. For example, in her December 2, 2020 email advising the Applicant that the Officer hoped to reach her decisions before the next summer she states "but you are reminded that the courses cannot be

re-installed (or rather the buoys and the jump) until you have received the required approvals" and in her January 28, 2021 email advising the Applicant that approval for the North and South Courses would be denied, the Officers states: "As a result of the denials of the north and south courses, you will be required to remove them. The concrete anchors can stay, however, any and all infrastructure above the bed of the waterway must be removed".

[61] The marker buoys and ramp would have most recently been installed in the spring of 2020. The Officer made her request that the Applicant submit applications for approval in August 2020. On a plain reading of the definition of "works", the above surface aspect of the courses–the buoys and the ski jump–would be captured by "any structure, device or other thing, whether temporary or permanent, that is made by humans".

[62] The Officer did not specify what provision of the *CNWA* that she was relying on to support her request that the Applicant submit applications for the courses.

[63] Section 10(1) states that an owner who proposes to construct, place, alter, rebuild, remove, or decommission a work in, on, over, under, through, or across any navigable water not listed in the schedule (which would include Lake Puslinch) must take one of the two listed steps if the work, or its construction, placement, alteration, rebuilding, etc., may interfere with navigation. The first of these steps is to make an application for approval (s 10(1)(a)). The Applicant submits that s 10(1) has no application as it applies to future proposed works and the courses were already set. I note, however, that s 10(2) states that an application under s 10(1)(a) is deemed to be an application made under s 5(1). Section 7(1) states that if the Minister is of the

opinion that a work that is the subject of an application made under s 5(1), or is construction, placement, alteration, rebuilding, removal, or decommissioning, may interfere with navigation, the Minister must inform the owner, in writing, of that opinion and the owner may only proceed if the Minister issues an approval for the work. However, s 7(13) of the *CNWA* permits the Minister, if he or she considers that it is justified in the circumstances, to approve the placement of a work *after* the placement begins or is completed.

[64] In August 2020, the placement of the buoys for that season had already been effected and without prior approval. The Officer was therefor authorized, by way of the deeming provision of s 10(2) and ss 5(1) and 7(13) to require that the Applicant seek approval after the placement occurred and to decide whether the approvals should be granted or denied. Accordingly, the Officer made her request after the coming into force of the Act. No issue of the retrospective application of the *CNWA* arises. I note that in her decisions the Officer did not require the removal of the cement block buoy anchors, presumably as they were not deemed to interfere with navigation and, therefore, not subject to *CNWA* approval.

Issue 2: Was the Applicant denied procedural fairness in the approval process?

Applicant's position

[65] The Applicant submits that it was not afforded an opportunity or the procedural means by which to make submissions about a "hidden investigation" as it was denied the opportunity to review and respond to both the triggering complaints and the comments received in response to the Notice. And, when the Applicant was informed that the approvals were likely to be denied, it

was not afforded an opportunity to present its case and have it fully and fairly considered. The only option was to submit a new application. Further, that the Officer overly relied on the comments received in response to the Notice and her failure to consider supporting comments and/or conduct her own investigation illustrates wilful blindness, unfairness and bias.

Respondent's position

[66] The Respondent submits that the Officer explained the information required for the applications, assisted the Applicant throughout, and allowed the Applicant to correct or supplement the information it had provided. The correspondence between the Applicant and the Officer and the Officer's detailed review of the data and information in the CTR demonstrate that the process was transparent, thorough, and fair. A peer review of the file was also conducted and mitigation strategies proposed by the reviewer were discussed with the Applicant.

[67] Further, there is nothing in the *CNWA* that requires the Officer to provide the public comments to the Applicant and allow it to respond. Nor does the Applicant point to any authority to support that it should have been provided with an opportunity to make further submissions when the Officer determined that the courses created an unacceptable level of interference to navigation. Nor does the Applicant suggest what it would have said that it could not have said during the application process. The Respondent submits that it was not improper to deny the Applicant an opportunity to make further submissions once a decision had been made. At that point, the Applicant could, and did, file a new application for approval for a new proposed location.

[68] The Respondent submits that, ultimately, by using the mathematical equation provided in the Navigational Impact Assessment Guideline it was determined, based on the measurements provided by the Applicant, that there was insufficient horizontal clearance for safe navigation in the South and North Course locations.

[69] The Respondent submits that many of the comments made in the public submissions concerned issues not within the jurisdiction of Transport Canada and, therefore, were not considered.

Analysis

[70] Based on the materials contained in the CTR it is apparent that the NPP request that the Applicant submit applications for approval were based on three email complaints. The first of these was made on July 28, 2020 and includes aerial photographs of Puslinch Lake annotated by the complainant to indicate various things, including the waterskiing courses, and listing the complainant's concerns. The Officer notes that the complainant was concerned about remaining anonymous and their name is redacted in the CTR. A second complaint was submitted on August 4, 2020 referencing the first. A third complaint was received on July 31, 2020, which alleged obstructions to navigation, specifically the waterskiing courses and jump, attaching a map purporting to show the courses. This complainant requested that the complaint be kept confidential alleging that "those who have placed the waterski courses have repeatedly over an extended period engaged in unlawful intimidation of other lake users through, amongst other actions, habitually violating safe-boating laws, uttering threats of physical violence, and engaging in actual physical violence".

[71] It is not disputed by the Respondent that the Applicant was not advised of these complaints or that complaints were what triggered the Officer's request that the Applicant submit the approval applications for the courses.

[72] In the result, when providing information in support of the application, the Applicant had no knowledge that actual specific concerns had been raised with the NPP and that the Officer's request was not simply a matter of obtaining the approvals for the sake of good order.

[73] As a part of the approval process, the required Notice was posted on October 29, 2020. Public comments on the requested approval had to be received not later than 30 days after posting. Appendix A of the CTR contains complaints received from November 1, 2020 to November 29, 2020 for the North Course and Appendix B contains the complaints from November 2 to November 27, 2020 for the South Course.

[74] Many of these complaints contain information that is not directly relevant to the issue that the Officer had to consider. For example, letters complain that: the Ski School operators monopolize, dominate, and act as if they own the lake and do not respect other users; the Ski School boats operate aggressively and in a manner intended to intimidate other lake users– operators yell at people to get out of the way, drive towards other users and do not allow them enough time to pass safely through the course, deliberately swamp paddle boards and other users, drive dangerously, and fail to utilize spotters, etc.; the Ski School disrupts wildlife including driving at swans and other birds and took it upon itself to obtain a permit to kill swans deemed to be a problem for skiers; the Ski School's operations impact water quality of the lake; the Ski

School operations are noisy and disturb the enjoyment of other property owners; the Ski School does not proportionally contribute to the efforts to maintain the health of the lake, etc.

[75] If accurate, these comments may well establish that the Ski School has not been a good neighbour or may be sufficient to ground other types of complaints, but this was not relevant to whether the waterski courses interfered with safe navigation, which was what the Officer had to decide.

[76] The letters also raise issues that are directly related to safe navigation such as: the distance of the courses from the shore and the ability to navigate safely around them; the interaction between the use of the courses with other lake users and the safety of those users, such as swimmers, paddle boarders, kayakers, canoeists, and others; the small size of the lake and how the courses impact safe navigation in this limited space given the lake's multiple users, natural obstructions, and shallow areas; and that the courses and jump are not marked so that they can be seen when navigating at night, etc. Some of the public comments were very detailed and included aerial photographs with annotations and measurements inserted by the commenters.

[77] The Officer was also aware from the public comments that those who opposed the approvals almost uniformly sought to remain anonymous because of an alleged fear of retribution from the Ski School. Further, and significantly, that some residents were using the Notice requirement as a platform for an attempt to shut down the Ski School. One email is from Lake Residents closeskischool@gmail.com, it refers to a prior email encouraging lake residents to make their views known to Transport Canada and stating, "It is overwhelmingly obvious that

many have had negative or dangerous experiences with the ski school and would like to see it gone – but that will not happen unless you send your letters or email with your concerns and experiences [to NPP]". A reply to the same email states that the sender is 100% in support of the idea of closing the Ski School as it is noisy and its people rough and inconsiderate.

[78] Jaime McClintock also alerted the Officer to this campaign, forwarding a November 18, 2020 message from Lake Residents closeskischool@gmail.com. That email notes that the Ski School had to apply for permits to continue its business the following summer, urged lake residents to make their views known, provided an "editable letter" that could be submitted anonymously in that regard, and suggested each adult in each household should mail in their opposition.

[79] Appendix A of the CTR includes a matrix table all of the opposing comments pertaining to the North Course. The "Summary of Internal Navigation Impact Assessment" field of the Navlnfo Database information provided in the CTR states that the course "appears to be located in the only navigable, safe passage on the north side of the lake" and that public comments confirmed that the course is blocking navigation and that the frequent use of the course made it extremely difficult to navigate. Property owners who own docks parallel to the course cannot safely leave their docks and head straight out into the water because of the course location and to enter the water body vessels must navigate extremely close to the shoreline which is unsafe because of the high amounts of water activities (swimming, skiing, paddled vessels).

[80] It appears from the final navigation review summary, contained in the "Internal Review Complete" field of the NavInfo Database information in Appendix A, that the Officer's conclusions are based almost entirely on the public comments. The summary then states that as a result of the comments the NPP calculated the horizontal clearance between the buoys and the shoreline to support its decisions. The summary states that the NPP was provided with a photograph (from one of the public submissions opposing the course approvals) displaying a set of buoys left off the application. The NPP states that it used that set of buoys (40m from shore) as part of their calculations. These calculations showed 29m available for horizontal clearance, but that 39.5m was required for safe two-way traffic and the use of the course. The summary states that it was relevant to note that multiple letters of support were received regarding all three applications from local lake residents and Water Ski Wakeboard Ontario, but that "[n]one of the letters contested/contradicted the navigational concerns that were raised".

[81] Of course, none of the persons commenting in favour of the approvals were aware of the content of the opposing submissions. They were therefore unlikely to contest the specific navigational concerns raised in those submissions. And, in fact, some of the supporting letters (subsequently provided in Appendix C) do address navigational matters. One indicates that the courses are ideally located and pose no issues with safety and navigation and that waterskiers tend to stay close to the slalom courses and leave the rest of the lake free for others. Further, that the lake usage by non-lakefront owners had dramatically increased that summer, due to the pandemic, to the point where the situation was unmanageable and possibly unsafe. This necessitated the closure of the private boat launch to the public, which improved boat traffic and lake use. Other letters also make this point. Some indicate the location of the courses and that

they are safe both when in use and when not in use and discuss the general positioning of the course and the ability to navigate safely around them.

[82] The Respondent submits, however, that at the end of the day, the Officer's analysis boils down to her horizontal clearance calculation. The Officer utilized a formula contained in Transport Canada's "Development of a Guidance Document with Regard to a Safe Navigation Envelope" [TC Guide] to calculate a horizontal clearance of 21.5m necessary for each side of the North Course. She then added 30m to this required safety buffer zone which she states is based on a guideline document from the International Waterski and Wakeboard Federation, concluding that a 51.5m safe buffer zone was required on each side of the North Course. It is not clear from the record how this figure was reconciled with the Officer's above finding that a 39.5m buffer zone was required.

[83] The CTR also contains a document titled "How to Lay Out a Slalom Course". Other than stating "text and drawings by Bruce Kistler", on its face the document has no attributing source. On a separate page in the CTR is written "Source: International Waterski & Wakeboard Federation (wsf.com)". While this is not the correct website, as indicated by counsel for the Applicant, on the International Waterski & Wakeboard Federation's website, under "Other Waterski Information", the document is listed and linked [Kistler Document].

[84] Prior to making her decisions, the Officer did not advise the Applicant that either the TC Guide or an additional buffer zone, based on "How to Lay Out a Slalom Course", were being used to calculate a horizontal safety buffer. On February 1, 2021, the Applicant asked in an

email, for the purposes of looking at new placements and applications after the Officer had advised it that its North and South Course applications were refused, what calculations or legal requirements were used to determine navigability. By reply email on February 3, 2021, the Officer stated that from the outermost extremities of the slalom course (buoys or jump) there must be at least 51.5 m of clear navigable water on both sides of the course. She did not indicate the source of that calculation.

[85] This is particularly relevant to the Officer's comment in her notes that although a supporting letter from Water Ski Wakeboard Ontario had been received, neither it nor any of the supporting comments "contested/contradicted the navigational concerns that were raised". The Officer also received a November 25, 2020 letter from Water Ski and Wakeboard Canada, which identified itself as the governing body for towed water sports. The direction of letter was that there are only a few nationally recognized slalom courses in Canada for high performance training and competition and that the Ski School is one of those sites and a premier ski school in Canada. The letter concludes by inviting the NPP to contact the author directly, if it should have any questions or require further information in support of the application. As neither the Applicant nor Water Ski and Wakeboard Canada were advised that a horizontal buffer zone was being calculated pursuant to the TC Guide and, more significantly, that an additional waterskiing buffer zone was being added to this based on the Kistler Document, it could not realistically be expected that either would contradict the navigational concerns addressed by that calculation or the calculation itself.

[86] In this matter, the negative public comments received by the Officer certainly outnumbered the positive. But the Officer was aware of the campaign aimed at closing down the Ski School. Still, her summaries indicate that she relied heavily on the negative comments, including the annotated photographs and measurements included with them, in reaching her conclusions. The Officer did not visit Puslinch Lake herself. Included in the CTR is the TC/NPP "Directive on the Partial Return to On-Site Inspections During the COVID-19 Pandemic". It indicates, in the background section, that since the beginning of the pandemic only emergency travel has been approved. However, the directive permits travel with the appropriate level of approval.

[87] In my view, if the Officer could not herself visit the lake to conduct her assessment, in the interests of fairness she should have raised her concerns with the Applicant and afforded the Applicant the opportunity to respond to the concerns, rather than relying–what appears to be almost exclusively–on the opposing comments. Then, supporting her conclusion based on those comments utilizing the TC Guide increasing the buffer zone by an additional 30m based on an undisclosed document, the Kistler Document.

[88] The Respondent submits that the *CNWA* does not require the NPP to alert an applicant to triggering complaints or to concerns raised in the public comments or to afford them an opportunity to respond. That is true, however, this does not displace any duty of procedural fairness owed by the Officer. Similarly, the Respondent asserts that the Officer did not have to afford the Applicant to make applications for the course for approval after they were placed, pursuant to s 7(13), but could have simply ordered the removal of the courses pursuant to s

13(1). Assuming that the requirements of s 13(1) were met, I have difficulty with the suggestion that the Officer could simply demand removal of the courses without affording the Applicant some form of procedural fairness.

[89] Further, the Respondent relies on s 10 of the *CWNA* to support the Officer's authority to require the applications for approval. As indicated above, the Officer was authorized, by way of the deeming provision of s 10(2) and ss 5(1) and 7(13), to require that the Applicant seek approval after the placement occurred and to decide whether the approvals should be granted or denied. Pursuant to s 7(1), if the Minister is of the opinion that a work that is the subject of an application under s 5(1) may interfere with navigation, then the Minister "must inform the owner, in writing, of that opinion" and the owner can then only proceed with the work if the Minster issues an approval. This suggests a level of procedural fairness. However, here the Officer did not inform the Applicant of her concern that the courses may interfere with navigation. Rather, she indicated that the Applicant had not sought approvals but must do so in order for the work to be brought into compliance.

[90] It is also of note that another officer conducted a peer review on January 25, 2021– although it is not apparent from the record what exactly she was provided with when she was asked to do so. The peer review states that the complaints from the waterway users are all valid concerns that should be addressed. The reviewer states that her approach, before approving or denying anything, would be to provide the proponent (the Ski School) with a summary of the concerns (ensuring that there was no way to identify the source of the statements) and give it an opportunity to address them. Ideally, this would result in the Ski School selecting new locations

for its courses that may relieve the concerns and/or invite stakeholders to a collaborative process to come up with a shared use plan. The peer reviewer stated that by giving the proponent the opportunity to resolve the issues, the Officer would be fair and thorough in her process, which would be important in the event of litigation. As to the West Course, the reviewer commented that from a purely navigational perspective there was plenty of open water to share the use of that area. Users did not have to navigate in the footprint of the course to get by it. The North Course had the greatest safety issues and the reviewer stated that she would prefer to see it repositioned further from shore. The South Course posed the greatest interference with navigation but it might be possible to mitigate the impacts, although this might limit the use of the course. The peer reviewer's bottom line was that she supported the Officer's assessment to date but suggested that the Officer put her findings to the Ski School to attempt to find solution before the Officer rendered a final decision. Failing that, the Officer would then be in a solid position to issue the denials based on the process followed.

[91] The Officer did not follow this suggestion. Instead, in her January 28, 2021 email she advised that the approvals for the North and South Courses would be denied and set out her rationale for this.

[92] In response, the Applicant stated its view that it was entitled to a reasonable opportunity to provide information and respond to the issues raised before the Officer issued her formal decisions. I note that by email of December 9, 2020, the Applicant had previously written to the Officer setting out the financial impact that the closure of one or more of the courses would have on the Applicant as well as the impact on ski students. By email of January 29, 2021, the Officer

stated that the Applicant's opportunity to respond to the issues raised by the NPP would be in the form of new applications for approval for new locations on the lake, yet still did not disclose the basis of the concerns raised or how the horizontal clearance distance had been calculated.

[93] In my view, in these particular circumstances, a duty of fairness was owed by the Officer to the Applicant. The Officer was making an administrative decision that affected the Applicant's "rights, privileges or interests" (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653; *Baker* at para 20). The Officer was also aware that the Ski School's business depended upon the use of the water skiing courses. As to the content of the duty of fairness owed, the "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682; *Baker* at para 21). Here, considering the circumstances and the *Baker* factors, I conclude that the duty of fairness required that the Applicant be afforded notice of the concerns raised by the triggering complaints and of the general content of the negative responses to the Notice and, the opportunity to respond to the comments before the Officer made a final decision. The Applicant was also entitled to know how the horizontal buffer zone had been calculated. I note that contrary to the Respondent's written submissions, the CTR indicates that the Applicant was not advised, before the formal decision letters were issued, that there had to be 51.5m of clear navigable water. The decision letters are dated February 1, 2021 and the email from the Officer responding to the Ski School question as to the horizontal buffer zone is dated February 3, 2021. Even then, the Officer did not disclose that in addition to her TC Guide calculation she had relied on Kistler Document. Nor was I able to locate anything in the CTR to

support the Respondent's submission that the Officer discussed the peer review officer's proposed mitigation strategies with the Applicant prior to issuing her decisions.

[94] As to the over 100 nearly identical affidavits submitted by the Applicant after the decisions were issued – these were not before the decision maker when she rendered her decision. Thus, they are inadmissible to the extent that they speak to the merits of the issue that was before the Officer. However, in the context of procedural fairness, they are significant. They all state that the affiants support the continued use of the courses, that the courses do not adversely impact the navigability on the lake, that the area where the North Course is located is not congested, that the North Course does not block or impede navigation, and that it can be safely navigated around when the course is in use; that the South Court does not block or impede safe passage and provides sufficient horizontal clearance of safe navigation and other water activities and that the affiant has no navigational concerns with respect to the courses. Thus, had the Officer advised the Applicant of the substance of the concerns raised by those opposing the approvals, the Applicant could have put forward responding information which the Officer could have considered and weighed in her assessment.

[95] In sum, based on the record, it does not appear that the Officer visited Puslinch Lake herself and instead relied primarily on the comments of those opposed to the Ski School in making her decisions. The Officer was aware that the Notice requirement was being used as a platform in an effort to close down the Ski School. In these particular circumstances, the Officer should, as her colleague suggested, have raised her concerns with the Ski School and afforded it an opportunity to respond.

Issue 3: Were the denials of the approval applications reasonable?

[96] Given my finding that the Officer breached her duty of procedural fairness, I need not address the reasonableness of her decisions (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 661), including her consideration of the documents provided as Appendix C to the CTR.

Costs

[97] When appearing before me the parties advised that they had not discussed the quantum of costs (see the November 30, 2010 Notice to the Parties and the Profession, Costs in the Federal Court) but that they would consult and advise the Court as to the outcome of these discussions. Subsequently, by letter dated May 11, 2021, the parties advised that they had not been able to reach agreement as to the quantum of costs, but were prepared to submit bills of costs or make submissions concerning costs.

[98] Considering the discretion of the Court concerning costs, as set out in Rule 400, I have concluded that the Applicant shall have its costs in accordance with Tariff B, at the lower range of column III.

JUDGMENT IN T-376-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The February 1, 2021 decisions denying the applications for approval of the North and South Courses are quashed and the matters are remitted back to a different Navigation Protection Program Officer for redetermination, on an expedited basis, and having regard to these reasons and that the 2021 waterskiing season will open at the end of this month; and

2. The Applicant shall have its costs based on the lower range of Column III of Tariff B.

"Cecily Y. Strickland"
Judge

Annex A

Canadian Navigable Waters Act, RSC 1985, c N-22

Definitions

2 The following definitions apply in this Act.

work includes

(a) any structure, device or other thing, whether temporary or permanent, that is made by humans, including a structure, device or other thing used for the repair or maintenance of another work; and

(b) any dumping of fill in any navigable water, or any excavation or dredging of materials from the bed of any navigable water. (ouvrage)

…

Works

3 Except in accordance with this Act, it is prohibited to construct, place, alter, rebuild, remove or decommission a work in, on, over, under, through or across any navigable water.

Application for approval

5 (1) An owner who proposes to construct, place, alter, rebuild, remove or decommission one of the following works must make an application for an approval to the Minister — in the form and manner, and containing the information, specified by the Minister — if the work, or its construction, placement, alteration, rebuilding, removal or decommissioning, may interfere with navigation:

(a) a major work in, on, over, under, through or across any navigable water; or

(b) a work — other than a minor work — in, on, over, under, through or across any navigable water that is listed in the schedule.

Related works

(2) If the Minister is of the opinion that two or more works are related, the Minister may consider them to be a single work.

Additional information

(3) For the purpose of determining whether the work or its construction, placement, alteration, rebuilding, removal or decommissioning may interfere with navigation, the Minister may require from the owner any additional information that the Minister considers appropriate.

No interference with navigation

6 If the Minister is of the opinion that a work that is the subject of an application made under subsection 5(1), or its construction, placement, alteration, rebuilding, removal or decommissioning, would not interfere with navigation, including by changing the water

level or water flow of a navigable water, he or she must inform the owner, in writing, of that opinion and no approval is required under subsection 7(6) for that work — or its construction, placement, alteration, rebuilding, removal or decommissioning.

Interference with navigation

7 (1) If the Minister is of the opinion that a work that is the subject of an application made under subsection 5(1), or its construction, placement, alteration, rebuilding, removal or decommissioning, may interfere with navigation, including by changing the water level or water flow of a navigable water, he or she must inform the owner, in writing, of that opinion and the owner may only construct, place, alter, rebuild, remove or decommission that work if the Minister issues an approval for the work.

Information

(2) The owner must deposit any information specified by the Minister in any place specified by the Minister.

Notice

(3) The owner must publish a notice containing any information specified by the Minister in any manner specified by the Minister.

Comment period

(4) The notice referred to in subsection (3) must invite interested persons to provide written comments on the owner's proposal to the Minister within 30 days after publication of the notice or within any other period specified by the Minister.

Exemption

(5) If the Minister is satisfied that the owner has already deposited sufficient information in a place specified by the Minister or published a sufficient notice, the Minister may exempt the owner from the application of subsection (2) or (3), as the case may be.

Approval

(6) The Minister may issue an approval for the work, including its site and plans, if he or she considers it appropriate in the circumstances.

Assessment — factors

(7) In determining whether to issue the approval, the Minister must consider the following:

(a) the characteristics of the navigable water in question;

(b) the safety of navigation in that navigable water;

(c) the current or anticipated navigation in that navigable water;

(d) the impact of the work on navigation, including as a result of its construction, placement, alteration, rebuilding, removal, decommissioning, repair, maintenance, operation or use;

(e) the impact of the work, in combination with other works, on navigation, if the Minister is provided with, or has in his or her possession, information relating to that cumulative impact;

(f) any Indigenous knowledge that has been provided to the Minister;

(g) any comments that he or she receives from interested persons within the period provided for under subsection (4);

(h) the record of compliance of the owner under this Act; and

(i) any other information or factor that he or she considers relevant.

Additional information

(8) For the purpose of determining whether to issue the approval, the Minister may require from the owner any additional information that the Minister considers appropriate.

Terms and conditions

(9) The Minister may attach any term or condition that he or she considers appropriate to an approval including one that requires the owner to

(a) maintain the water level or water flow necessary for navigation purposes in a navigable water; or

(b) give security in the form of a letter of credit, guarantee, suretyship or indemnity bond or insurance or in any other form that is satisfactory to the Minister.

Effect of approval

(10) An approval issued under this section in relation to a work replaces any approval previously issued in relation to that work.

Contiguous area

(11) The Minister may, in an approval, designate an area contiguous to a work that is necessary for the safety of persons and navigation and, for the purposes of the approval, that area is considered to be part of the work.

Compliance with requirements

(12) The owner must comply with the approval and maintain, operate and use the work in accordance with the requirements under this Act.

Approval after activity begins

(13) The Minister may, if he or she considers that it is justified in the circumstances, approve the construction, placement, alteration, rebuilding, removal or decommissioning of a work after the construction, placement, alteration, rebuilding, removal or decommissioning begins or is completed.

…

Application or notice

10 (1) An owner who proposes to construct, place, alter, rebuild, remove or decommission a work — other than a major work or a minor work — in, on, over, under, through or across any navigable water that is not listed in the schedule must take one of the following steps

if the work, or its construction, placement, alteration, rebuilding, removal or decommissioning, may interfere with navigation:

(a) make an application for an approval to the Minister, in the form and manner, and containing the information, specified by the Minister; or

(b) deposit any information specified by the Minister in any place specified by the Minister and publish a notice in any manner, and including any information, specified by the Minister.

Deeming

(2) An application made under paragraph (1)(a) is deemed to be an application made under subsection 5(1) and, if an approval is issued under subsection 7(6) in respect of the application, the work to which the approval relates is deemed to be a work constructed or placed in, on, over, under, through or across a navigable water that is listed in the schedule.

Comment period

(3) The notice referred to in paragraph (1)(b) must invite interested persons to provide written comments on the proposal, as it relates to navigation, to the owner within 30 days after publication of the notice or within any other period prescribed by regulation.

Application

11 (1) This section applies to any work in, on, over, under, through or across any navigable water that is constructed, placed, altered, rebuilt, removed, decommissioned, repaired, maintained, operated or used contrary to the requirements under this Act.

Minister's powers

(2) The Minister may

(a) order the owner of a work to repair, alter or remove the work;

(b) during the construction, placement, alteration, repair, rebuilding, removal or decommissioning of a work, order any person to remove or alter the work or to do any other thing with respect to the work, including taking all measures necessary for the safety of navigation;

(c) if the owner or the person fails to comply with an order given under paragraph (a) or (b), cause any thing to be done with respect to the work, including the removal of the work, its destruction and the sale, donation or other disposal of the materials contained in the work; and

(d) order any person to refrain from proceeding with the construction, placement, alteration, repair, rebuilding, removal or decommissioning of a work.

……

Repair, alteration or removal

13 (1) The Minister may order the owner of a work in, on, over, under, through or across any navigable water to repair, alter or remove it if he or she considers that

> **(a)** it interferes more with navigation at the time in question than it did when it was constructed or placed;
>
> **(b)** it is causing or is likely to cause a serious and imminent danger to navigation; or
>
> **(c)** its repair, alteration or removal is in the public interest.

Works

(2) The Minister may, if he or she is satisfied that it is necessary in the circumstances, order the owner to do any other thing with respect to the work.

Failure to comply

(3) If the owner fails to comply with an order made under subsection (1) or (2), the Minister may do any thing with respect to the work that he or she considers appropriate.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alan S. Cofman Andrea Fernandes	FOR THE APPLICANT
Kathryn Hucal	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Fernandes Hearn LLP Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Department of Justice Toronto, Ontario	FOR THE RESPONDENT